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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALMONT AMBULATORY SURGERY CENTER, LLC, a California limited liability company; BAKERSFIELD SURGERY INSTITUTE, LLC, a California limited liability company; INDEPENDENT MEDICAL SERVICES, INC., a California corporation; MODERN INSTITUTE OF PLASTIC SURGERY & ANTIAGING, INC., a California corporation; NEW LIFE SURGERY CENTER, LLC, a California limited liability company, dba BEVERLY HILLS SURGERY CENTER, LLC; ORANGE GROVE SURGERY CENTER, LLC, a California limited liability company; SAN DIEGO AMBULATORY SURGERY CENTER, LLC, a California limited liability company; SKIN CANCER &

CASE NO. 2:14-CV-03053-DMG-VBK

DEFENDANTS' AND COUNTERCLAIM PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO OMIDI MOTION TO BIFURCATE AND STAY DISCOVERY

(Superior Court of the State of California, County of Los Angeles, Central District Case Number: BC540056)

RECONSTRUCTIVE SURGERY SPECIALISTS OF BEVERLY HILLS, INC., a California corporation; VALENCIA AMBULATORY SURGERY CENTER, LLC, a California limited liability company; WEST HILLS SURGERY CENTER, LLC, a California limited liability company,

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC.; UNITED HEALTHCARE SERVICES, INC., UNITEDHEALTHCARE INSURANCE COMPANY; OPTUMINSIGHT, INC., and DOES 1 through 20,

Defendants.

UNITED HEALTHCARE SERVICES, INC.; UNITEDHEALTHCARE INSURANCE COMPANY; OPTUMINSIGHT, INC.,

Counterclaim Plaintiffs

v.

ALMONT AMBULATORY SURGERY CENTER, LLC, , a California limited liability company; BAKERSFIELD SURGERY INSTITUTE, LLC, a California limited liability company; BEVERLY HILLS SURGERY CENTER, LLC; INDEPENDENT MEDICAL SERVICES, INC., a California corporation; MODERN INSTITUTE OF PLASTIC SURGERY & ANTIAGING, INC., a California corporation; NEW LIFE SURGERY CENTER, LLC, a California limited liability company, dba BEVERLY HILLS SURGERY CENTER, LLC; ORANGE GROVE SURGERY CENTER, LLC, a California limited liability company; SAN DIEGO AMBULATORY SURGERY CENTER, LLC, a California limited liability

Hearing

Date: Monday, February 2, 2015
Time: 10:00 a.m.
Courtroom: 1600, 16th Floor, 312 N. Spring Street

Discovery cutoff: None set
Pretrial Conference Date: None set
Trial Date: None set

company; SKIN CANCER & RECONSTRUCTIVE SURGERY SPECIALISTS OF BEVERLY HILLS, INC., a California corporation; VALENCIA AMBULATORY SURGERY CENTER, LLC, a California limited liability company; WEST HILLS SURGERY CENTER, LLC, a California limited liability company, KAMBIZ BENJAMIN OMIDI (A/K/A JULIAN OMIDI, COMBIZ OMIDI, KAMBIZ OMIDI, COMBIZ JULIAN OMIDI, KAMBIZ BENIAMIA OMIDI, JULIAN C. OMIDI); MICHAEL OMIDI, M.D.; ALMONT AMBULATORY SURGERY CENTER, A MEDICAL CORPORATION; BAKERSFIELD SURGERY INSTITUTE, INC.; CIRO SURGERY CENTER, LLC; EAST BAY AMBULATORY SURGERY CENTER, LLC; SKIN CANCER & RECONSTRUCTIVE SURGERY SPECIALISTS OF WEST HILLS, INC.; VALLEY SURGICAL CENTER, LLC; TOP SURGEONS, INC.; TOP SURGEONS, LLC; TOP SURGEONS LLC (NEVADA); WOODLAKE AMBULATORY; PALMDALE AMBULATORY SURGERY CENTER, A MEDICAL CORPORATION; 1 800 GET THIN, LLC; SURGERY CENTER MANAGEMENT; DOES 1-200,

Counterclaim Defendants.

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INTRODUCTION

The Court should deny the motion by Julian and Michael Omidi (the "Omidis"), which seeks to bifurcate the claims against them and to stay all discovery relating to their individual roles in this case.[1]

As an initial matter, it should be remembered that it was effectively the Omidis (using their Provider entities) who started this lawsuit. Although the Omidis will no doubt argue that it was the Providers and not they who sued United, the pleadings make clear that the "Omidis are the Providers" and the "Providers are the Omidis." To try to separate one from the other is to tear a seamless web. It would be perversely unfair and profoundly prejudicial to permit them to proceed with their own claims while disabling the counterclaims that United filed against them. But that would be the impact of granting the motion to stay or bifurcate.

Granting the Omidis' motion will also inject significant inefficiency into this case because the Omidis are implicated not only as alter-egos, but also as direct actors and co-conspirators in a scheme to defraud United and the health plans it administers. Now that they are being called to account for their fraudulent scheme, it is wholly impractical to "bifurcate" the Omidis themselves from the expansive, byzantine and hard-to-follow trail of corporations, bank accounts and other tools of deception that were "designed to obfuscate the true nature of the alleged enterprise." (Dkt. #92 (Order Denying Mot. to Quash 2)).

In any event, besides being baseless, the Omidis' motion is pointless. Nearly all of the discovery they seek to avoid as relating to the alter-ego and conspiracy issues in the counterclaim is *also* relevant to (1) the Omidis' direct liability; (2) the Providers' direct liability; and (3) the affirmative defenses that United asserted in

[1] Both bifurcation and a stay of discovery raise similar issues, since they both attempt to block the litigation against the Omidis. The two forms of relief will thus be discussed together, with additional consideration given to some issues raised by the discovery stay (*See* section IV, *infra*).

response to the original claims in the Complaint. This information remains legitimately discoverable for reasons far beyond the asserted justification for the stay motion. Nor should the Omidis be permitted, as they request, to stay discovery and other proceedings in the related action (No. 14-2039) involving hundreds of employer/plan defendants who are not even party to this motion.

There is similarly no basis for the Omidis to delay, stay or disrupt this litigation on Fifth Amendment grounds. Motions to stay are disfavored; as a rule, civil cases proceed even when parallel criminal proceedings are pending. That is particularly true where, as here, the party seeking a stay has not yet been indicted. The Omidis seek a wholly indefinite stay, until the final resolution of any and all criminal investigations. Moreover, to the extent that the Omidis' motion seeks to even preclude *third-party* discovery, it is totally inappropriate because the Fifth Amendment protects only testimonial *self*-incrimination.

This motion is a gambit to frustrate the orderly prosecution of this suit, which the Omidis themselves instigated even though they already knew that they were subjects of a grand-jury investigation. The gamesmanship behind the motion is illustrated by the fact that the Omidis failed to object on Fifth Amendment grounds to the very discovery that they now ask the Court to stay because of professed Fifth Amendment concerns. The Fifth Amendment provides a specific and limited form of protection to criminal defendants; it is not intended to give the Omidis strategic and tactical *advantages* in defending against civil liability, while the Providers (controlled by the Omidis) pursue claims and explore defenses against United.

RELEVANT PROCEDURAL BACKGROUND

I. Claims Against the Omidis and Their Entities.

United's First Amended Counterclaim ("FACC") currently has six counts:[2] Count 1 – fraud; Count 2 – UCL violations; Count 3 – Conspiracy to commit fraud;

[2] The precise allegations of the counterclaim may change if the Court orders

Count 4 – intentional interference with contractual relations; Count 5 – restitution under ERISA; and Count 6 – declaratory and injunctive relief under ERISA. Each cause of action is pleaded against all counterclaim defendants, including the Omidis personally.

The Omidis are alleged to be at the center of what Magistrate Judge Kenton described as a "rather massive medical and financial fraud" that, among other things, involved the improper waiver of member responsibility amounts and the submission of false or misleading claims. (Dkt. #92 (Order Denying Mot. to Quash 2.))

Through their aggressive 1-800-Get-Thin advertising campaign and the waiver of member responsibility amounts, the Omidis lured more than 1600 United Members into undergoing an assembly line of medical services, in violation of not only the terms of the United Plans but also common law and statutory proscriptions. (*See, e.g.*, FACC ¶¶ 1, 3, 119, Appendix I.) In addition to illegally waiving such "co-pay" amounts, the Omidis directed clinic staff to pressure patients to undergo unnecessary services simply to increase the amount they could charge United. These services cost United and its Plans millions of dollars. (*Id.* at ¶¶ 1, 5, 17.)

The Omidis also dictated the physicians' medical decisions and treatment recommendations. (*See, e.g., id.* at ¶¶ 107-08.) One physician has testified that the Omidis personally ordered him to sign "pre-printed" form letters seeking insurer approval for surgery, even though the physician had not examined the patients. (*Id.*) The Omidis personally hired physicians and agreed to pay them illegal referral bonuses, and operated their clinics in violation of California's corporate practice of medicine standards. (*Id.* at ¶¶ 108-10.)

United to amend with respect to certain theories. However, what would *not change* in a subsequent version of the counterclaim is the centrality of the Omidis in the wrongdoing that supports the causes of action.

Indeed, the Omidis were personally involved in every aspect of the scheme and artifice to defraud United: they submitted false claims to United for services they supposedly rendered, called United to obtain prior authorization for Lap Band surgery, were the named payee on checks from United, and personally endorsed checks that were deposited into the Counterclaim Defendants' shared bank accounts. (*See, e.g.*, *id.* at ¶¶ 97, 232, Ex. C, Appendix I.) The Omidis carried out this scheme, which has spanned nearly nine years, by working with a network of co-conspirators to establish a web of shell companies that was specifically designed to deceive United by hiding the identity of the provider submitting the claim, and thus, the fraud. (*See, e.g.*, *id.* at ¶¶ 71-78, 90, Ex. A.)

In summary, United alleges that the Omidis personally devised, orchestrated, and participated in a scheme and artifice to defraud United by (i) luring patients to their Providers through the 1-800-Get-Thin campaign (*Id.* ¶ 1); (ii) waiving member responsibility amounts, including copayments, to induce patients to seek treatment without concern for costs or medical necessity (*id.* ¶¶ 3, 119); (iii) organizing and controlling literally hundreds of corporate entities to pursue and conceal the scheme (*id.* ¶¶ 71-78, Ex. A); (iv) personally treating United members (*id.* Appendix I); (v) directing inappropriate medical decision-making (*id.* ¶¶ 107-08); (vi) calling United to seek pre-authorization for procedures (*id.* ¶ 232; and (vii) endorsing United checks (*id.* ¶ 97). As such, the Omidis may be held personally liable for their own actions.

In addition, United alleges that the Omidis are liable as co-conspirators because they were part of—indeed, central to—a coordinated scheme by a collection of individuals who agreed to defraud United. (*See, e.g.*, *id.* ¶¶ 76-78). Finally, the Omidis are also alleged to be personally liable as the "alter egos" of the corporate counterclaim defendants and other shell entities they engineered to create

a shifting corporate structure as a way to conceal their scheme and artifice to defraud United. (*See, e.g.*, ¶¶ 72, 115, 116, 126).

More broadly, the fraud and other claims *against the Provider defendants* also implicate the Omidis on a factual level. The Omidis established, owned and/or control each of the Provider entities. (*See, e.g.*, *id*. ¶¶ 90, 105, 107, Ex. A). The fraudulent activities of the Providers were directed by the Omidis (*see, e.g.*, *id*. ¶ 107 (Julian Omidi ordered execution of over 600 blank insurer authorization forms), and in part committed directly by the Omidis. Discovering and proving the case against the Provider defendants will necessarily involve discovering and proving the role of the Omidis in the fraud and other wrongful conduct.

II. United Affirmative Defenses Involving the Omidis.

In addition to the causes of action pled against the Omidis, they are factually implicated in virtually all aspects of the case, including the Provider claims against United. For example, United's Seventeenth Affirmative Defense raises the same specific co-payment and co-insurance fraud that United alleged as a claim in the counterclaim. United similarly alleges the affirmative defenses of the Providers' unclean hands (Eighth Affirmative Defense), that they caused their own losses (Fourteenth Affirmative Defense), set-off and recoupment against the Providers' claims (Eighteenth Affirmative Defense), and that United told the Providers that payment was contingent on the plan terms (Nineteenth Affirmative Defense). Each of these implicates the Omidis' fraudulent scheme and other wrongdoing. United is clearly permitted to explore the viability of its defenses through discovery.

III. Status of Discovery and Omidi "Alter Ego" Objections.

Consistent with the parties' then-agreement, in their 26(f) Report, that discovery should not be bifurcated, United served its first set of discovery requests on the Providers and Omidis in October 2014. These requests sought information necessary for United's defenses to the Providers' affirmative claims, as well as

information relevant to United's counterclaims. The requests were designed, in part, to identify the basis for the Providers' claims, including whether the Providers are entitled to the payments they seek, or whether they have voided coverage through, among other things, co-pay waivers. Another purpose was to better understand the scheme and artifice to defraud United that forms a basis for United's affirmative defenses and counterclaims.

The Omidis' response was to stonewall United. A few examples illustrate how the Omidis and the Providers have, as part of a unified strategy, flatly objected to responding to almost all of this discovery—even the most standard litigation documents—as relating to the "alter ego" allegations against the Omidis. (*See* Declaration of Kirsten E. Schubert ("Schubert Decl."), Exs. 1, 2, 3, 4, 5)) For example, both the Providers and the Omidis refused to produce organizational charts (Exs. 1 & 4 at RFP 4), contracts, payroll information, or records identifying employees who participated marketing, treatment and billing of the Lap-Band procedures at issue (*id.* RFP 5, 7); information related to the creation of the corporate entities that have submitted bills to United or have otherwise facilitated the Omidis' scheme, agreements between Counterclaim Defendants, and other corporate documents (*id.* RFP 6, 11; Exs. 2 & 5 at Interr. 9); tax returns (Exs. 1 & 4 at RFP 12); and bank account information[3] (*id.* RFP 16; Exs. 2 & 5 at Interr. 4). The Omidis refused to even admit whether they signed certain corporate documents and checks cited in the FACC (Ex. 3 at RFA 1-4), or even to identify the *mailing*

[3] Similarly, United sought in its third-party subpoena to Wells Fargo to track the "proceeds of this alleged fraudulent operation into various common bank accounts" that the Omidis controlled. (Dkt. #92 (Order Denying Mot. to Quash 3.)) The Omidis tried unsuccessfully to quash that subpoena, and are now asking this Court to reverse the decision made by Magistrate Judge Kenton that the Wells Fargo subpoena seeks relevant, discoverable information. That dispute is described in more detail in those motion papers.

addresses they have used over the course of the conspiracy (Ex. 2 at Interr. 5). Further, to the extent the Omidis did not object on "alter ego" grounds, they objected on relevance grounds or stated that they did not have possession, custody, or control of the requested documents and information. They also incorporated the objections of the Providers—meaning the Omidis provided no substantive responses to United's discovery. (*See, e.g.*, Schubert Decl., Exs. 1, 2.) Notably, however, the Omidis did not object to a single request on Fifth Amendment grounds. (*See id.*)

The Omidis' ongoing refusal to provide responsive information is a discovery dispute that may well require judicial intervention, but for present purposes their broad definition of what is relevant to alter ego significantly undermines their position that "United is free to pursue discovery against the Providers . . . and obtain adjudication of the surviving underlying counts against the[m]." (Omidi Mot. at 12.) The Omidis seek to have it both ways: characterizing even the most basic discovery request as relating to alter ego while at the same time contending in their motion that alter ego issues (and, indeed, the Omidis themselves) can be neatly and harmlessly excised from this case.

In fact, what the Omidis characterize as "alter-ego" discovery is relevant to numerous core issues of the case, including who was acting as a conspirator, what they were told by the Omidis, and how they were compensated; whether the Omidis signed fraudulent documents; and what other direct actions the Omidis took to supervise, orchestrate, and directly perpetrate the scheme to defraud United.[4]

[4] Magistrate Judge Kenton correctly recognized the pending discovery as relevant to a wide array of legal issues in the case (not, as the Omidis contend, only to alter ego). (Dkt. #92 (Order Denying Mot. to Quash 2.)) United anticipates that this Court will reach the same conclusion when ruling on the Omidis' appeal of Magistrate Judge Kenton's ruling.

ARGUMENT

I. Bifurcation and Stays of Discovery are the Exception, not the Rule.

With regard to both bifurcation and a stay of discovery, the Omidis are seeking exceptional relief, not the normal course of proceedings. The Ninth Circuit recognizes, for example, that the request to stay civil proceedings against a potential criminal defendant should normally be denied. *See Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). "The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." *Id*.

With regard to the Omidis' claims that a stay will enhance efficiency and judicial economy, the weight of authority recognizes that it is normally far more efficient to proceed on all claims at once than to bifurcate or stay alter ego claims. For example, in *I-Systems, Inc. v. Softwares, Inc.*, several defendants facing fraud, deceptive trade practices, and conspiracy claims sought to bifurcate the proceedings into two parts: "the first involving all of plaintiff's claims except the alter ego claim, and the second involving the alter ego claim." 2004 WL 742082, at *18 (D. Minn. Mar. 29, 2004). The defendants asserted there—as the Omidis do here—that "if plaintiffs do not prevail on their substantive claims at trial, the alter ego issues would become moot." *Id*. The district court disagreed, denying the request to bifurcate and explaining:

> Initially, the Court does not agree that bifurcation would further judicial economy and convenience. . . . [A]ll defendants are controlled and managed by the same small group of people. These people will undoubtedly be called as witnesses regarding the substantive claims and, because of their involvement in all companies, the alter ego claim. Maintaining all of the claims in one action allows these people to testify once rather than twice. . . . [H]earing from each person once seems more efficient and practical than possibly hearing from each witness twice in two separate proceedings.

Id.

This reasoning is equally applicable here. Indeed, the cases denying motions to bifurcate alter-ego claims – due to prejudice to the delayed party and no compensating efficiencies – are legion. *See, e.g., Interstate Restoration Grp., Inc. v. Al Copeland Inv., et al.*, 2009 WL 1870787, at *4-*5 (E.D. La. June 25, 2009) (**denying** motion to bifurcate alter-ego liability from question of underlying liability; observing that "bifurcation of the claims would most likely prejudice the nonmoving party, Interstate, by unnecessarily delaying the final resolution. Moreover, further delay increases the chance that fading memories and lost evidence will prejudice Interstate. The Defendants' argument that litigation of the alter ego claim may not be necessary does not outweigh the harm that Interstate would suffer if bifurcation were ordered."); *United States v. ERGS, Inc.*, 2006 WL 778622 (D. Nev. Mar. 27, 2006) (**denying** motion to bifurcate alter-ego liability from question of underlying liability; observing that "[b]ifurcation in this instance will result in two trials that will involve calling a significant number of the same witnesses. Bifurcation would likely increase the inconvenience to the court and parties"); *Glover v. Standard Fed'l Bank*, 2001 WL 34635708, at *1 (D. Minn. Aug. 9, 2001) (**denying** motion to bifurcate alter-ego liability from question of underlying liability; observing that alter-ego issues can provide circumstantial context and motive evidence); *Tidewater Marine, Inc. v. Sanco Int'l, Inc.*, 1998 WL 131738, at *6 (E.D. La. Mar. 20, 1998) (**denying** motion to bifurcate alter-ego liability; explaining that "[t]he Court believes that the plaintiffs could be severely prejudiced by the considerable delay that would result if the Court ordered separate trials with separate discovery periods").

In seeking to bifurcate, the Omidis are asking for extraordinary relief, and their motion does not begin to justify departing from the normal course of litigation.

II. Neither Efficiency Nor the Fifth Amendment Justify The Motion to Bifurcate and Stay Discovery

As previously explained, the Omidis are properly joined as Counterclaim Defendants to this action because they are the "hub" for over 200 corporate-entity "spokes." The Omidis directed the 1-800-GET-THIN marketing campaign, the improper waiver of member responsibility amounts, the unlawful corporate practice of medicine, fraudulent billing, and the deposit of the proceeds of this scheme in hundreds of bank accounts that they controlled. Although they now seek to detach themselves from the Providers and the other "spokes" through which the fraud was perpetrated, it was the Omidis who created the bewildering array of companies, accounts and other tools of deception "designed to obfuscate the true nature of the alleged enterprise." (Dkt. #92 (Order Denying Mot. to Quash 2.)) The Omidis are inexorably intertwined with the claims and defenses for both the Complaint and the Counterclaim here, especially those pertaining to the loss of coverage due to the waiver of member responsibility amounts and other fraudulent activity.

Notwithstanding their centrality to the current dispute, the Omidis broadly offer two justifications for their attempt to bifurcate "the issue of Dr. Michael and Julian Omidi's personal liability, whether based on alter ego or conspiracy theories" and to stay discovery. First, they suggest that it would be more efficient and economical, and second, that it would not require them to choose between complying with their discovery obligations and asserting the Fifth Amendment privilege against testimonial self-incrimination. As explained below, neither alleged justification supports bifurcation or a stay of this case.

A. Bifurcation would not remove the Omidis' involvement in the case.

The premise of the Omidis' motion is that the Omidis themselves (and the claims for "alter ego" and "conspiracy") can be surgically excised from this case

without harming any other parties' litigation rights or impeding the progress of all of United's other counterclaims. This is simply not true. The Omidis' are directly and inextricably involved with all of United's counterclaims and, to a significant extent, United's affirmative defenses to the Provider claims.

Although the Omidis myopically focus on the alter-ego allegations as the basis for their involvement in this case, in fact they are named defendants in each count of the FACC. They are alleged to have directly participated in the fraudulent submission of claims and other wrongful conduct. (*See*, *e.g.*, FACC ¶¶ 178, 07-109; 121.) They are alleged to have controlled and directed the entire fraudulent scheme that ultimately led to the submission of millions of dollars of fraudulent claims to United. This includes not only the *paid claims*, which are the subject of the FACC, but also the *unpaid fraudulent claims*, which are the subject of the Providers' claims in the case. Finally, the Omidis are alleged to be co-conspirators, acting with other individuals and numerous entities to mastermind the fraudulent scheme.

In this context, the alter-ego allegations against the Omidis are merely one basis for their personal liability. Moreover, their involvement in the activities of the Omidi network is a critical portion of the facts relevant to proving the liability of other Counterclaim Defendants.

Whenever a corporate entity, such as a Provider, is alleged to be civilly liable for fraud and other wrongdoing, the fraudulent conduct is committed by and at the direction of human beings, in this case the Omidis. Even if the alter-ego and conspirator liability of the Omidis as individuals was bifurcated, the Omidis' actions in the case would still have to be litigated as a way of proving the liability of the Providers and other corporate participants in the Omidi Network. Attempting to litigate the liability of the Provider defendants without addressing the actions of the Omidis would be like trying to litigate an airline's fault for a plane

crash, without addressing the actions of the pilot, or the maintenance crew, or the executives responsible for overseeing and directing the activities of the pilot and the maintenance crew. It cannot be done.

The proposed bifurcation regarding issues of the Omidis' liability would not in any meaningful way reduce the need for discovery from and about the Omidis' activities, nor would it reduce the relevance of those activities at a trial.

B. <u>There is no efficiency gain in bifurcating and staying discovery on the conspiracy and alter-ego claims</u>.

Given the impossibility of litigating this matter without addressing the actions of the Omidis and other related facts, there is no efficiency gain whatsoever in bifurcating the "issues" of the Omidi personal liability under alter-ego and conspiracy theories.[5] The Omidis' argument and the cases they cite focus almost entirely on the question of alter-ego liability. The substantial case law rejecting an "efficiency" stay of alter-ego issues is addressed above.

With respect to conspiracy claims, the law rejecting bifurcation and stays is, if anything, even more emphatic. *See, e.g.*, *Maxey v. State Farm Fire & Cas. Co.*, 569 F. Supp. 2d 720, 722 (S.D. Ohio 2008) (**denying** motion to bifurcate bad-faith/conspiracy claims from breach-of-contract claim; observing that "bifurcating these claims and delaying discovery on this case until after the conclusion of the breach of contract claims could result in unnecessary duplication, delay, and expense and does not serve the interest of judicial economy"); *Mopex, Inc. v.*

[5] An additional reason to deny the motion is the vagueness of the requested relief. The "issue" of the Omidis' liability could be stretched to mean almost anything. As shown by current ongoing discovery disputes in the case, the Omidis have been highly aggressive in expanding the concept of alter-ego discovery to thwart United's legitimate discovery on all issues. A non-specific bifurcation order such as requested in the motion would have a similar negative effect on case management.

Chicago Stock Exch. Inc., 2003 WL 715652, at *9 (N.D. Ill. Feb. 27, 2003) (**denying** motion to bifurcate tortious-interference and conspiracy claims; observing that "the remaining conspiracy count, overlaps with Count V and involves all of the defendants. Defendants have not sufficiently raised any other arguments that would warrant bifurcating these remaining claims in light of the increased delay, expense, and inconvenience.").

It is particularly ironic that the Omidis seek a stay of the conspiracy claim, given their vigorous assertion of the statute of limitations in this case. The conspiracy claim is highly relevant to the limitations issues in the case. As the Court knows, one key basis for holding United's claims to be timely is the accrual rule for *a civil conspiracy claim*. *E.g.*, *Wyatt v. Union Mortg. Co.*, 598 P.2d 45, 52-54 (Cal. 1979). The Omidis seek to prevent litigation of a theory, civil conspiracy, that would clearly render United's claims timely.[6]

Whereas, in some cases, alter-ego issues may arise in connection with the collection of a judgment already rendered against a judgment-proof corporate entity, conspiracy as a theory is inseparable from the underlying allegations of fraud and other wrongful conduct. For example, the FACC alleges that the Omidis

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[6] The Omidis' motion addresses this issue by claiming that the Court's initial assessment of the *Wyatt* case and the accrual rules for conspiracy claims is wrong. (Omidi Mot. 2, n.2.) That is not true. The holding of *Wyatt* (and numerous other California cases) is clear: "when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of a plaintiff's claims until the 'last overt act' pursuant to the conspiracy has been completed." 598 P.2d at 53. The language quoted by the Omidis is not the *holding* of *Wyatt*, but rather an explanation of why the rule of law being applied makes sense under the specific facts of *Wyatt*: "The situation of the respondents, on the other hand, *demonstrates* the equities served by the 'last overt act' doctrine." *Id*. at 54 (emphasis added). But *Wyatt* is simply one example of a "consistent line of cases that have applied the 'last overt act' doctrine to civil conspiracies." *Id*. at 53. That doctrine applies here as well, for reasons already briefed and argued in detail in connection with the recent motions to dismiss.

perpetrated their conspiracy, in large part, through a universal policy of waiving patient co-pay amounts in order to induce patients to use the Omidi Providers. (*See, e.g.*, FACC ¶ 3.) Litigating that claim, including engaging in relevant discovery, necessarily involves questions such as whether the Providers were directed by the Omidis to waive copays and whether the complex web of Omidi-related corporate entities was established to conceal the fraud. If the Providers deny waiving copays, but there is evidence that the Omidis directed them to waive copays, that evidence would be relevant to the Omidis' role in the fraud. It would *also* rebut the Providers' denials, because if they were directed by the Omidis to waive co-pays, that supports the inference that they acted in accordance with instructions from the individuals who created and control the Provider entities.

Since the same facts are relevant to the Omidis' liability, the Providers' liability, and United's affirmative defenses, bifurcation will not save time or create efficiencies. To the contrary, the same issues will have to be litigated twice. There would have to be discovery, motion practice and trial on the non-bifurcated claims, and then a subsequent trial, involving largely the same facts, on the alter-ego theory and conspiracy claims against the Omidis. This massive duplication of effort would waste the Court's and the parties' resources.

C. The Omidis' potential criminal liability and Fifth Amendment rights do not support bifurcation or a stay.

The Omidis raise the specter of their potential indictment for criminal wrongdoing as grounds for bifurcating the claims against them and staying discovery, until such time as that risk is no longer present. Neither the legal rules governing the Fifth Amendment nor the specific facts of this case justify bifurcation or a stay based on the Omidis' potential criminal liability.

First, the general rule is that civil cases can and do proceed in the face of parallel criminal proceedings. *Keating*, 45 F.3d at 324. As the Omidis' motion grudgingly concedes, this general rule is even stronger where, as here, there is no actual indictment, but rather investigations that may – or may not – result in the Omidis being charged with a crime. *See eBay, Inc. v. Digital Point Solutions, Inc.*, 2010 WL 702463, at *3 (N.D. Cal. Feb. 25, 2010) (acknowledging that when "no indictment" has yet been returned, "the case for a stay is much weaker" in part because the delay to the plaintiff is "potentially indefinite"); *see also In re Homestore.com, Inc. Securities Litig.*, 347 F. Supp. 2d 814, 820-21 (C.D. Cal. 2004) (denying motion to stay civil securities case pending resolution of related criminal proceedings when there was no indictment and no evidence of the timeline of the government's criminal investigation).

The nature of this case (an action started by the Omidis' own Providers) adds a strong fairness component to the reasons for denying the stay. A plaintiff should not be allowed to start a lawsuit and then use the Fifth Amendment to hamper the party it chose to sue. *Wehling v. Columbia Broadcast System*, 608. F.2d 1084 (5th Cir. 1979), stresses the importance of this consideration:

> The plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to gain an unequal advantage against the party he has chosen to sue. To hold otherwise would, in terms of the customary metaphor, enable plaintiff to use his Fifth Amendment shield as a sword. This he cannot do.

Wehling, 608 F. 2d at 1087-88. The inequity of the Omidis' "shield/sword" ploy is heightened here, where the Omidis have known since 2012 of at least one criminal investigation into their activities. (Kriendler Decl., ¶ 9.) In other words, they already knew about this issue when they directed the Providers to sue United.

While it is true that at some point the Omidis may need to choose between providing testimony that incriminates them or asserting the Fifth Amendment and

facing an adverse-inference instruction to the jury, that is simply a result of their underlying activities. As the *Keating* court pointed out:

> A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.

45 F.3d at 326 (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). If the Omidis had not engaged in conduct of interest to various government investigators, they would not be in the situation of having to elect whether or not to assert Fifth Amendment rights.

The factors to be considered in staying a civil proceeding while waiting for criminal proceedings to resolve are set forth in *Keating*, 45 F.3d at 324-25. They include "the extent to which defendant's Fifth Amendment rights are implicated," and five additional factors: (1) the interest of the non-moving party in proceeding expeditiously with the civil case and the prejudice caused by delay; (2) the burden on the moving party of proceeding; (3) the convenience of the Court in managing its cases; (4) interests of non-parties to the civil litigation; and (5) the public interest. In the present case, those factors do not justify a stay.

First, contrary to the Omidis' claim, the consideration of the "extent" to which Fifth Amendment rights are implicated does not favor their motion. There is no actual indictment or other formal charge against the Omidis. As noted above, courts recognize that the lack of an actual indictment argues against stay of the pending civil litigation.

This factor also works against the Omidis because the lack of an indictment makes it impossible to assess the extent of overlap between this civil proceeding and a hypothetical future criminal proceeding. In support of their motion, counsel

for the Omidis reveals, without further explanation, only the existence, since 2012, of a grand-jury investigation. (Kriendler Decl., ¶ 9.) Although United has pointed out the probable overlap between the facts relevant to this civil litigation and publically disclosed government investigations of the Omidis, the *extent* of that overlap (as distinct from potential criminal liability for conduct not implicated by this lawsuit) is best known to the Omidis' counsel, who has elected to provide no information in this regard. Absent more fulsome disclosure, the extent of the overlap cannot be known without the return of an indictment, which may or may not occur. Because the Omidis bear the burden of demonstrating entitlement to the extraordinary relief of a stay, this ambiguity about the precise nature of their legal jeopardy cuts against their motion.

The other five *Keating* factors, addressed below, similarly support denial of the motion:

Prejudice to United and interest in expeditious proceedings: This factor strongly favors proceeding with the litigation. The Omidis seek a stay of unknown and indefinite duration. By contrast, one of the cases the Omidis rely most heavily on, *Pinnock*, was a limited 90-day stay. *See* 2014 WL 4679007, at *4. *See also eBay*, 2010 WL 702463, at *6 (denying stay pending criminal proceedings in part because "proceeding with the civil case will best serve the interests of the public by ensuring that aggrieved parties are made whole as rapidly as possible" (internal quotation marks omitted)); *In re Homestore.com, Inc. Securities Litig.*, 347 F. Supp. 2d at 820-21 (observing that indefinite stays are particularly disfavored). There is no basis to stop a part of this lawsuit—a lawsuit that the Omidis instigated—for potentially years to come based on generalized concern for possible Fifth Amendment issues.

In addition, United would be gravely prejudiced if it is prevented from pursuing the heart of its case, and, as explained above, key affirmative defenses,

while the Providers pursue unimpeded their claims for millions in benefits under the self-funded plans that United administers. The fraud is a defense to the claims the Omidis are bringing, and their motion seeks to prevent United from conducting discovery on this part of its defenses while the Providers pursue their claims. The asymmetrical nature of the Omidis' request (impose a stay on United but permit the Providers to go full speed ahead) requires denial of the motion: "The stay of discovery Plaintiffs seek is one-sided and would impose an undue hardship on Underwriters. Plaintiffs seek to continue pursuing relief while depriving Underwriters of information that may be valuable to Underwriters' defense." *Pendergest-Holt v. Certain Underwriters at Lloyd's of London and Arch Specialty Ins. Co.*, 2010 WL 3199355, at *3 (S.D. Tex. Aug. 11, 2010).

It is precisely this one-sided advantage that makes courts reluctant to grant such relief. The risk of criminal liability should not constitute a litigation *advantage* for the party whose conduct has subjected him to that risk. *See Wehling*, 608 F. 2d at 1087– 88. *See also eBay*, 2010 WL 702463, at *6 (denying motion to stay civil-fraud action pending resolution of related criminal proceedings; observing that "potential criminal conduct should not serve as a shield against a civil law suit and prevent plaintiff from expeditiously advancing its claim").

Burden upon defendants: The Omidis make the bare, unsupported assertion that participating in this litigation threatens "potential disruption of their banking and other relationships with third parties." There is no record evidence or further explanation of how or why this is alleged to be true. Indeed, given the grounds that the Omidis have stated (under seal) to recuse Magistrate Judge Kenton, and the fact that numerous documents responsive to United's discovery requests have been seized by the Government, *see* Schubert Decl. ¶ 7, there is no basis to believe that the continuation of this lawsuit will disrupt these relationships

any more than they have already been disrupted. The Omidis are parties to civil litigation like anyone else, and they have identified no unique burden that justifies the extraordinary relief they seek.

Case management: This factor strongly favors denial of the stay. Not only would bifurcation (and the accompanying stay of discovery) complicate the Court's task in general, it would require the Court to act as referee to numerous additional disputes over the scope of the "issues" that the Omidis want stayed and numerous discovery disputes. Among other things, the Omidis' and the Providers' expansive view of what discovery relates to "alter ego" claims, *see supra* at 6, foreshadows the overbroad objections that they will no doubt raise to future legitimate discovery requests, citing the stay as both their "shield" and their "sword."

Interest of non-parties and the public: There are numerous non-parties to this case who would benefit from its prompt resolution in full. In particular, the "Plan Defendants" in case number 14-2139, which are not parties to this action, will be prejudiced because the Omidis attempt to stay discovery involving their personal conduct in that action as well. They too will benefit from resolution of the claims and counterclaims in this action, particularly insofar as the Omidis provide discovery relevant to the waiver of copay defense and that defense is litigated. The resolution of issues related to that defense will affect whether the Plan Defendants are liable under their self-funded plans.

The public interest is, if anything, even clearer. First, the public is served when healthcare providers repay amounts they wrongfully obtained through fraudulent claims. *E.g.*, *United States v. Lucien*, 347 F.3d 45, 48 (2d Cir. 2003) (recognizing that "health care fraud drains billions of dollars from public and private payers annually"). Further, the public has an interest in seeing crimes investigated. If the investigation supports an indictment, the public has an interest in prosecution of the offenders.

The Omidis have yet to explain convincingly just what is wrong with an entity such as United cooperating with the government in a lawful manner. To the extent United cooperates and complies with information requests from government investigators, that furthers the public interest.[7] *Int'l Bus. Machs., Corp. v. Brown*, 857 F. Supp. 1384, 1388-89 (C.D. Cal. 1994) (**denying** motion to stay civil RICO/Fraud action pending resolution of related criminal proceedings; observing that "this court sees no reason why those victims who have the resources and willingness to pursue their own investigation and enforce their own rights should be precluded either from doing so or from sharing the fruits of their efforts with law enforcement agencies. If the ultimate result of such private investigation is that criminals can be brought to justice with a minimum diversion of public resources, the interests of society are irrefutably served."). The Omidis' attempt to erect roadblocks and delay discovery is contrary to the public interest.

Moreover, the Omidis' attempts to hamper United's investigation go far beyond the legitimate scope of the Fifth Amendment. The Omidis seek to prevent even third parties from providing relevant discovery to United, on the grounds that United may share it with government agencies. As discussed in Section III below, that is ***not*** a Fifth Amendment issue. Nothing in the Fifth Amendment permits the Omidis to thwart third-party discovery.

Each of the *Keating* factors strongly favors denial of the motion.

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[7] The Magistrate Judge has recently required United to provide the Omidis *notice* when it is supplying materials obtained in discovery to government entities. This in turn will permit the Omidis to raise any lawful objections to that process in an orderly manner, based on the specific materials at issue.

III. The Motion to Stay Discovery Should be Denied.

The analysis above applies equally to both the Omidis' motion to bifurcate and to the request to stay discovery. There are also additional aspects of the request for discovery stay which warrant denial of that request.

First, Omidis cannot justify their attempts to stay third-party discovery by citing the Fifth Amendment. The Fifth Amendment protects only testimonial acts by the Omidis. *See Baltimore Social Servs. v. Bouknight*, 493 U.S. 549, 556–58 (1990); *Fisher v. United Sta*tes, 425 U.S. 391, 401, 408 (1976). The privilege does not, however, grant an individual the right to preclude disclosure of third-party information which may ultimately prove to be incriminating. As the Supreme Court has explained:

> It is also settled that a person inculpated by materials sought by a subpoena issued to a third party cannot seek shelter in the Self–Incrimination Clause of the Fifth Amendment. The rationale of this doctrine is that the Constitution proscribes only compelled self-incrimination, and, whatever may be the pressures exerted upon the person to whom a subpoena is directed, the subpoena surely does not 'compel' anyone else to be a witness against himself.

S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) (citations omitted). Thus, a third party's production of documents in that third party's possession is not something the Omidis can block by the assertion of the Fifth Amendment. The privilege against self-incrimination protects only compelled testimonial self-incrimination by an individual, and is not held by corporations at all. *Doe v. United States*, 487 U.S. 201, 206 (1988); *Bellis v. United States*, 417 U.S. 85, 90 (1974).

Second, the Omidis have not even interposed a Fifth Amendment objection to the existing discovery. United served its document requests on the Omidis on October 10, 2014. They responded on December 8, 2014, and submitted numerous objections, including objections based on various privileges under state and common law. But they did not assert any Fifth Amendment-based objection. This

absence stands in stark contrast with the Omidis' protestations that proceeding with United's claims put their Fifth Amendment rights in grave jeopardy. Indeed, if we are to take the Omidis' discovery responses at face value, they did not object on Fifth Amendment grounds so there is literally no pending discovery that even implicates the Omidis' Fifth Amendment rights.

Third, in a footnote at the end of their brief, the Omidis seek to extend the stay of discovery to the companion case in this matter, 14-2139. Substantively, that request should be denied for the same reasons expressed with regard to this case. Procedurally, the request is completely inappropriate. Requests to stay discovery in case number 14-2139 should be made in case number 14-2139, with service on all interested parties to that case and an opportunity for them to respond as appropriate.

Finally, the Court has a perfectly adequate existing mechanism to address specific discovery disputes. That system (initial reference to the Magistrate Judge with a right of appeal to this Court) has already begun to function in this case. There is no need for the blunt instrument of a blanket stay when individual disputes can be resolved, if necessary, through motion practice.

In the appeal currently pending before this Court, for example, the Magistrate Judge reviewed the Omidis' claims that numerous requests were irrelevant to a broad array of issues in the case. The Omidis claimed that this discovery was either solely for alter-ego issues or part of some imagined scheme to drive the Providers and the Omidis out of business because they are "out-of-network" providers. (Omidi Mot. 1-2.) As Magistrate Judge Kenton correctly noted, that is simply wrong. (Dkt. #92 (Order Denying Mot. to Quash 2-4.)) All three subpoenas seek evidence to support United's affirmative allegations concerning the Omidis' personal involvement, their conspiracy to conceal the fraud, and the scope of the fraud. The Wells Fargo subpoena also seeks evidence to support United's ERISA tracing allegation. Similarly, all three subpoenas seek evidence to support United's

defenses. Thus, discovery concerning each of these issues needs to move forward regardless of whether the Omidis are held liable as alter egos of the Providers.

CONCLUSION

The Omidis' motion for bifurcation and a stay of discovery should be denied.

Dated: January 12, 2015

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